

In a decision dated June 28, 2010, OWCP reduced appellant's wage-loss compensation benefits effective July 4, 2010 based on its determination that the constructed position of caregiver represented her wage-earning capacity. Appellant disagreed with the decision and requested an oral hearing, which was held on November 8, 2010. She stated that she was unable to work and that she only worked as a caregiver for a few days while her daughter was on vacation. In a decision dated February 9, 2011, an OWCP hearing representative affirmed the June 28, 2010 decision to reduce appellant's benefits. On March 25, 2011 appellant filed a request for reconsideration. She submitted a March 25, 2011 letter from her daughter who explained that she was a nanny by profession and that appellant worked and was responsible for one of the children under her care for only one week in 2010. Appellant also submitted various medical reports by Dr. Hampton Jackson, Jr., a Board-certified orthopedic surgeon, who related appellant's complaints of back pain resulting from the July 18, 1986 work injury and provided findings on examination. Dr. Jackson stated that her lumbar disc herniation and chemical

radiculitis were the result of the July 18, 1986 injury.¹ He continued to recommend that appellant avoid prolonged standing, walking, lifting, pushing and pulling and reported that work activities would increase her pain and aggravate her conditions. By decision dated September 14, 2011, OWCP denied appellant's request for reconsideration finding that the additional evidence submitted was insufficient to warrant further review under 5 U.S.C. § 8128(a).

The Board has found that once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

Although appellant's March 25, 2011 request used the term reconsideration, her letter and subsequent statements related to a request for modification of the June 28, 2010 wage-earning capacity determination. Her arguments were that she worked as a caregiver for only one week in 2010 and that she was physically unable to perform the duties of a caregiver. Appellant also submitted medical reports to support her argument that her accepted injury had worsened she was disabled from work. The Board finds that appellant's letter is a request for modification of OWCP's June 28, 2010 wage-earning capacity determination.⁴ This request for modification is not a request for review of OWCP's decision under 5 U.S.C. § 8128(a). Therefore, OWCP improperly characterized appellant's letter as a request for reconsideration under 5 U.S.C. § 8128(a). The case will be remanded to OWCP to adjudicate appellant's request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

¹ The Board notes that OWCP accepted appellant's claim for a lumbar strain.

² *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

³ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁴ See *L.D.*, Docket No. 11-591 (issued December 12, 2011); see also *E.R.*, Docket No. 11-770 (issued September 28, 2011).

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2011 is set aside and the case remanded for further action consistent with this order of the Board.

Issued: May 9, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board